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No._____

IN THE

Supreme Court of the United States

October Term, 1983

O'NEAL WILLIAMS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED

WHETHER THE TRIAL COURT VIOLATED PETITIONER'S FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION WHEN IT ORDERED HIM TO SPEAK IN THE PRESENCE OF THE JURY AT HIS CRIMINAL TRIAL.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Your Petitioner, O'NEAL WILLIAMS, prays that a writ of certiorari issue to the United States Court of Appeals for the Sixth Circuit to review its judgment and opinion entered in this proceeding on April 8, 1983.

OPINION BELOW

The opinion of the Court of Appeals, reported at 704 F.2d 315, appears in Appendix B hereto. No written opinion was rendered by the United States District Court for the Eastern District of Michigan.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on April 8, 1983. A timely petition for rehearing was denied on May 18, 1983. This petition for certiorari was filed within 60 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

U.S. Const. Amend. V:

> No person shall . . . be compelled in any criminal case to be a witness against himself . . . .

STATEMENT OF THE CASE

Petitioner O'Neal Williams was convicted by a jury in the United States District Court for the Eastern District of Michigan of attempted possession of cocaine, in violation of 21 U.S.C. § 844 and § 846. He was sentenced to eight months in prison and fined $1,000.

Mr. Williams' conviction was based on his arrival at a private residence while federal agents and Michigan state police were executing a search warrant to discover controlled substances, including cocaine (Tr. 267, 483, 486, 490). When Mr. Williams entered the driveway in a car, officers stopped the car (Tr. 511) and ordered Mr. Williams from the vehicle (Tr. 513). Asked to identify himself, Mr. Williams stated that his name was Jack Williams, and he produced a driver's license (Tr. 513, 514).

After Mr. Williams had been taken inside the residence, Michigan state police sergeant Robert Bertee

claimed to recognize Mr. Williams' voice as belonging to a telephone caller who had sometime before — twenty to thirty minutes (Tr. 177) or as much as forty-five minutes (Tr. 560) — called the residence (Tr. 175-178). The entirety of the telephone conversation was revealed in Officer Bertee's testimony (Tr. 175-177).

Q. What did you say when you picked the phone up?
A. "Hello."
Q. And the party on the other line, what did that person say?
A. Said, "Hello, Paul. This is Jack."
Q. And what did you say?
A. I said, "yeah, Jack."

* * *

Q. After you said, "Yeah, Jack," what did the caller say?
A. At this point, he said, "This doesn't sound like Paul." I told him . . . I told him at that time I had a cold, I just got back from Florida.

* * *

Q. What did the caller then say, after you told him you had just come back from Florida?
A. The caller asked if he could come up and pick up an ounce of snow.

* * *

Q. After this caller called and indicated that he wanted to come over the (sic) pick up some snow, what did you tell him?
A. I told him to come on up.
Q. Was there anything else said by either of you?
A. No.

Though Mr. Williams had declined to testify throughout the trial, after the government and defense had rested, the government was permitted to reopen its case in order to compel Mr. Williams to speak "for the purposes of the jury hearing his voice" (Tr. 1151). Over objection, the trial court compelled Williams to read from a lectern the following passage from TIME magazine:

> "Eighty percent of U.S. cats are common short-hairs and mixed breeds — 'alley cats' of little dollar value. But the price for grand-championship quality Abyssinian kittens and some others of the 33 recognized breeds in America can be as much as $3,000. Nearly 400 cat shows were held in the country this year, and some breeders believe the number may reach 450 next year.
>
> Last season the Tony Empire Cat Show in Madison Square Garden — the 'Westminster' of catdom — had to turn away thousands of enthusiasts." (Tr. 1140, 1151).

REASON FOR GRANTING THE WRIT

THIS COURT OUGHT TO GRANT CERTIORARI IN ORDER TO DETERMINE WHETHER THE FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION IS VIOLATED WHEN A CRIMINAL DEFENDANT IS REQUIRED TO SPEAK AT HIS TRIAL IN THE PRESENCE OF THE JURY.

By granting the Writ, this Court would resolve a fundamental issue of constitutional law that has never been addressed by this Court or by any federal court, except in this case. This case presents the Court with an opportunity to rule on Petitioner's contention that an in-court voice performance unconstitutionally compels demeanor evidence from the Defendant in the presence

of the jury. In doing so, the Court will refine the distinction between "testimonial" and physical evidence. Thus, review permits the Court to address a concrete procedural issue and elaborate on broad constitutional principles.

Though some state courts have held in-court voice performances to be constitutional, *see, e.g. Lusk* v. *Florida*, 367 So. 2d 1088 (Fla. App. 1979), none has considered Petitioner's contention that the government forced him to engage in conduct that revealed his emotional state of mind relative to the crime. His demeanor during the voice demonstration — whether nervous, anxious or resigned — may have been interpreted as evidence of guilt by the jury.

Leading social science research supports the proposition that compelling a live voice performance before a jury generates testimonial demeanor evidence:

> "The emotional state of a speaker reading a neutral passage can be recognized from a tape recording . . . Thus anxious people will speak fast in a breathy way, i.e. with a high frequency distribution with speech errors. A dominant or angry person speaks loudly and slowly with a low frequency distribution." Argyle, *Non-Verbal Communications in Human Social Interaction* in Non-Verbal Communication 251 (Hinde ed. 1972).

And the jury's interpretation of Petitioner's performance may well have been harsh:

> "To appear flustered in our society is considered evidence of weakness, inferiority, low status, *moral guilt*, and other unenviable attributes." Goffman, Interaction Ritual 101-102 (1972) (emphasis supplied).

The law as well recognizes that speaking in court inevitably produces demeanor evidence:

> "In legal concept, appearance and demeanor on the part of orally testifying witnesses in permitting trial atmosphere to which these incidents may give rise are, in such situations 'assumed to be in evidence.' Wigmore, On Evidence, Section 946." *Gamble-Skogmo, Inc.* v. *Federal Trade Commission*, 211 F.2d 106, 113 (8th Cir. 1954).

Thus, through the compelled elicitation of Petitioner's tenor of voice, facial expressions and deportment, the jury was given demeanor evidence reflective of Petitioner's state of mind, and, ultimately, his guilt.

That this demeanor evidence is "testimonial" rather than "physical" or "real" for Fifth Amendment purposes is derived from *United States* v. *Wade*, 388 U.S. 218 (1967), where the Court defined testimonial evidence to be " 'communications' in *whatever form, vocal or physical* . . . ." *Id.* at 223 (emphasis supplied). As explained in *Schmerber* v. *California*, 384 U.S. 757 (1966):

> "Some tests seemingly directed to obtain 'physical evidence,' for example, lie detector tests measuring changes in body function during interrogation, may actually be directed to eliciting responses which are essentially testimonial. To compel a person to submit to testing in which an effort will be made to determine his guilt or innocence on the basis of physiological responses, whether willed or not, is to evoke the spirit and history of the Fifth Amendment. Such situations call to mind the principle that the privilege 'is as broad as the mischief against which it seeks to guard.' *Counselman* v. *Hitchcock*, 142 U.S. 547 . . . ." *Id.* at 764.

Though the Court held in *Wade* that an accused could be compelled to demonstrate his voice *before* trial so that witnesses might identify him, it emphasized the case did not present any issue as to the admissibility at *trial* of what the accused had said. That careful qualification of the Court's holding was undoubtedly in response to the dissenting opinions that expressly addressed the issue raised in this case:

> "Had Wade been compelled to utter these or any other words in open court, it is plain that he would have been entitled to a new trial because of having been compelled to be a witness against himself." *Id.* at 245. (Black, J., dissenting).

The dissenting opinion of Justice Fortas joined by Chief Justice Warren and Justice Douglas expressed the same view. *Id.* at 260.

As with *Wade*, the Court's holding in *United States* v. *Dionisio*, 410 U.S. 1 (1973) does not dispose of this case. In upholding the compelled production of voice exemplars so that the grand jury could compare them with wiretaps, the Court was not faced with a trial setting where ultimate issues of guilt or innocence — not simply probable cause — would be determined. Nor was the Court faced with the variety of visual demeanor evidence that inheres in a "live" performance before a jury.

Petitioner's theory finds support in a Court of Military Appeals decision, *United States* v. *Greer*, 3 U.S.C.M.A. 576, 13 C.M.R. 132 (1953). There, the Court reversed the conviction of a defendant, who, over objection, was required to read from the Manual for Courts Martial so that the victim of the assault could identify him. Reasoning that the defendant "was required to exercise both his mental and physical faculties," the Court held

that defendant's privilege against self-incrimination had been violated. 13 C.M.R. at 134. *But cf. United States* v. *Armstrong*, 9 M.J. 374 (CMA 1980) (reversing prior holding that compelled blood tests violate privilege against self-incrimination).

By granting review in this case, the Court can elaborate on the meaning of *Wade*, *Schmerber*, and *Dionisio*. In doing so, the Court will flesh out the meaning of "testimonial" evidence, and resolve a substantial and unsettled procedural issue, the impact of which will be felt in every state and federal trial court.

CONCLUSION

For all of the above reasons, Petitioner O'Neal Williams requests this Court grant Certiorari.

Respectfully submitted,

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Dated: July 13, 1983

APPENDIX A

JUDGMENT

(United States District Court
Eastern District of Michigan
Southern Division)

(Dated January 26, 1982)

(United States of America vs. O'Neil (sic) Harrison Williams, Defendant — Docket No. 81-50055-4)

Counsel: In the presence of the attorney for the government the defendant appeared in person on this date: 01/26/82
☒ With Counsel: Sanford Kesten

Plea: ☒ Not Guilty

Finding & Judgment: There being a verdict of:
☒ Guilty
Defendant has been convicted as charged of the offense(s) of: Attempt to Possess Cocaine in violation of 21 USC 844.

Sentence or Probation Order: The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of eight (8) months imposed under the provisions of Title 18, United States Code, Section 4205(f) without the parole stipulation.

Further, the defendant is to pay a fine in the amount of one thousand dollars ($1,000.00) to the United States. The defendant ir (sic) ordered to stand committed until the fine is paid or he is otherwise discharged by due course of law.

Special Conditions of Probation: Bond is continued as set until the Court holds a hearing on the issue of an appeal bond. The hearing is currently set for February 9, 1982 at 2:00 p.m.

Additional Conditions of Probation: In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

Commitment Recommendation: The court orders commitment to the custody of the Attorney General and recommends, _____

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

Signed by: /s/ Stewart A. Newblatt
U.S. District Judge

(Certification Omitted)

APPENDIX B

OPINION

(United States Court of Appeals
for the Sixth Circuit)

(Filed April 8, 1983)

(United States of America, Plaintiff-Appellee, v. O'Neal Williams, Defendant-Appellant — No. 82-1105)

Before: Keith and Krupansky, Circuit Judges, and Phillips, Senior Circuit Judge.

Krupansky, Circuit Judge. This is a direct appeal by O'Neal Williams (Williams) from the judgment of the district court entered pursuant to a jury verdict convicting him of an attempt to possess cocaine. 21 U.S.C. §§ 844, 846. Williams charges fifth amendment infringements against self-incrimination when compelled, during his trial, to read a neutral passage from *Time* magazine to the jury for the purpose of voice identification.

The Michigan State Police and the United States Drug Enforcement Agency had jointly investigated certain individuals, including Ronald Conn (Conn) and Paul Arnott (Arnott), (2) and their involvement in the cocaine traffic and related offenses. In early April, 1982, the inquiry culminated with several arrests. On April 4, 1982, federal and state officials executed a warrant authorizing a search of the Conn residence. During the search, Sergeant Robert Bertee (Bertee) of the Michigan State Police answered the resident telephone. At trial, Bertee testified as follows:

> Q. What did you say when you picked the phone up?

A. "Hello."
Q. And the party on the other line, what did that person say?
A. Said, "Hello, Paul. This is Jack."
Q. And what did you say?
A. I said, "yeah, Jack."

* * *

Q. After you said, "Yeah, Jack," what did the caller say?
A. At this point, he said, "This doesn't sound like Paul." I told him . . . I told him at that time I had a cold, I just got back from Florida.

* * *

Q. What did the caller then say, after you told him you had just come back from Florida?
A. The caller asked if he could come up and pick up an ounce of snow.

* * *

Q. After this caller called and indicated that he wanted to come over and pick up some snow, what did you tell him?
A. I told him to come on up.
Q. Was there anything else said by either of you?
A. No.

Approximately 15 to 45 minutes thereafter Williams entered the driveway to Conn's residence in an automobile. Sergeant Thomas Curtis (Curtis) and Drug Enforcement Agent David (3) MacDougall (MacDougall) confronted Williams and ordered him out of the vehicle. Sergeant Curtis confiscated a weapon partially protruding from under the seat. After Williams

identified himself as Jack Williams, and produced a driver's license bearing the identity O'Neal Williams, he was escorted into the Conn residence. When Agent Bertee, who had been conducting a search of an upstairs bedroom, came downstairs and heard Williams speak, he recognized Williams' voice as that of "Jack", the individual who had telephoned earlier. Bertee stated, "You are Jack", to which Williams replied, "Yeah, I'm Jack, Jack Williams." $3,400 was confiscated from the person of Williams, together with a business card. A resident telephone number scribbled on the reverse side of this business card corresponded to the telephone number adjacent to the name "Jack" written on the back of a business card which had been taken from Arnott.

At trial, Bertee described the voice on the telephone as a "distinctive . . . gravelly-type voice" with a Southern drawl. After the defense had rested its case, the government moved to introduce an exemplar of Williams' voice as rebuttal evidence "for the purposes of the jury hearing his voice." Over objection, the district court granted the government's motion and compelled Williams to read from a lectern the following passage from *Time* magazine:

> Eighty percent of U.S. Cats are common short-hairs and mixed breeds — 'alley cats' of little dollar value. But the price for grand-championship quality Abssinian kittens and some others of the 33 recognized breeds in America can be as much as $3,000. Nearly 400 cat shows were held in the country this year, and some breeders believe the number may reach 450 next year.
>
> Last season the Tony Empire Cat show in Madison Square Garden — the 'Westminster' of catdom — had to turn away thousands of enthusiasts.

(4) Considering the issue of an asserted fifth amendment violation, it is initially observed that fifth amendment proscriptions do not attach where the evidence is not "relat[ed] to some communicative act," *Schmerber* v. *California*, 384 U.S. 757, 765, 86 S.Ct. 1826, 1833, 16 L.Ed.2d 908 (1966) (blood sample), or of "testimonial or communicative content." *United States* v. *Dionisio*, 410 U.S. 1, 7, 93 S.Ct. 764, 768, 35 L.Ed.2d 67 (1973) (voice exemplar). The privilege attaches only to testimonial compulsion and not to demonstrative, "physical or real" evidence. *See*: *South Dakota* v. *Neville*, — U.S. —, 51 U.S.L.W. 4148, 4150 (Feb. 22, 1983) (evidence of refusal to submit to a blood-alcohol test does not offend fifth amendment right against self-incrimination); *Gilbert* v. *California*, 388 U.S. 263, 87 S.Ct. 1951, 18 L.Ed.2d 1178 (1967) (handwriting exemplar); *United States* v. *Wade*, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967) (voice exemplar); *United States* v. *Euge*, 444 U.S. 707, 100 S.Ct. 874, 63 L.Ed.2d 141 (1980) (Congress may give Internal Revenue Service power to require taxpayers to furnish handwriting examples); *United States* v. *Mara*, 410 U.S. 19, 93 S.Ct. 774, 35 L.Ed.2d 99 (1973) (handwriting exemplar); *Holt* v. *United States*, 218 U.S. 245, 31 S.Ct. 2, 54 L.Ed. 1021 (1910) (defendant compelled to wear particular clothing).

The Supreme Court has twice proclaimed, in a non-trial context, that the distinctive resonance, speech and voice idiosyncrasies of an individual are identifiable *physical* characteristics, the compelled demonstration of which infringes no interest protected by the privilege against compulsory self-incrimination. *United States* v. *Wade*, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967); *United States* v. *Dionisio*, 410 U.S. 1, 93 S.Ct. 764, 35 L.Ed.2d 67 (1973). In *Wade* an individual was compelled, at a pretrial line-up, to state "something like 'put the money in the bag,' the words allegedly uttered by the

robber." 388 U.S. at 220, 87 S. Ct. at 1929. No fifth amendment guarantee had been infringed:

> (5) [C]ompelling Wade to speak within hearing distance of the witness, even to utter words purportedly uttered by the robber, was not compulsion to utter statements of a "testimonial" nature; he was required to use his voice as an identifying physical characteristic, not to speak his guilt.

388 U.S. at 222-23, 87 S.Ct. at 1930. In *Dionisio* the Supreme Court adjudged that the compelled production of a voice exemplar as sought by a Grand Jury failed to infringe upon fifth amendment guarantees. This Circuit, as others, has not limited *Dionisio* to the confines of Grand Jury proceedings. In *United States* v. *Franks*, 511 F.2d 25 (6th Cir.), *cert. denied*, 442 U.S. 1042, 95 S.Ct. 2656, 45 L.Ed.2d 693 (1975), this Court upheld the district court's order compelling defendants to produce voice exemplars for the purpose of permitting the government to compare said exemplars through spectrographic analysis to statements which had been tape recorded theretofore by undercover agents:

> We reject Mitchell's attempt to limit *Dionisio* to the grand jury context in that, so long as the underlying seizure of the person is proper, requiring that person to submit voice exemplars violates no constitutional right.

511 F.2d at 32. *Accord*: *United States* v. *Woods*, 544 F.2d 242, 263 (6th Cir. 1976), *cert. denied*, 430 U.S. 969, 97 S. Ct. 1652, 52 L.Ed.2d 361 (1977), *reh. denied*, 431 U.S. 960, 97 S.Ct. 2689 (1977). This Court has also affirmed a contempt order issued by a district court against a defendant who refused to produce a voice exemplar as ordered. *United States* v. *Mitchell*, 556 F.2d 371, 382 (6th Cir.), *cert. denied*, 434 U.S. 925 (1977).

The case at bar joins what appears to be an issue of first impression in the federal forum, namely, whether a defendant may be compelled to articulate in the presence of the jury to demonstrate his speech and voice characteristics for compara- (6) tive purposes.[1] Williams argues that such a mandated demonstration during trial is tantamount to an involuntary disclosure of vocal and physical demeanor patterns which could result in unfavorable jury reactions. Several psychological treatises are submitted to support this argument:

> The emotional state of a speaker reading a neutral passage can be recognized from a tape recording . . . Thus anxious people speak fast and in a breathy way, i.e., with a high frequency distribution and with speech errors. A dominant or angry person speaks loudly, slowly and with a lower frequency distribution.

Argyle, "Non-Verbal Communication in Human Social Interaction" in Hinde (ed.), *Non-Verbal Communication* at 251 (Cambridge Univ. Press, 1972);

> [T]o appear flustered, in our society . . . is considered evidence of weakness, inferiority, low status, moral guilt, and other unenviable attributes.

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[1] In *United States* v. *Brown*, 644 F.2d 101 (2d Cir.), *cert. denied*, 454 U.S. 881, 102 S.Ct. 369 (1981), the defendant had been compelling (sic) by the trial court to state during trial "give me your money, all your money, or I am going to blow you up" for the purpose of permitting the jury to hear defendant's voice. Justices Moore and Mulligan adjudged that such a compelled display failed to abdicate constitutional guarantees as predicated upon by the sixth amendment right to assistance of counsel or upon the fifth amendment right to due process. Justice Oakes dissented. The defendant failed to challenge the in-court voice exemplar as violative of a fifth amendment guarantee against compulsory self-incrimination.

Goffman, *Interaction Ritual*, at 101-02 (Doubleday & Co. 1977);

> [A]ll studies of adults thus far reported in the literature agree that emotional meanings can be communicated accurately by vocal expression.

Davitz, "A Review of Research Concerned with Facial and Vocal Expressions of Emotion," *The Communication of Emotional Meaning*, at 23 (Greenwood Press 1964).

(7) Confronting the issue of "live" voice exemplars as urged by the defendant, it is initially observed that both the federal and state forums have universally adjudged that compelling a defendant to actively cooperate in non-communicative activity in the presence of the jury does not abdicate fifth amendment guarantees. In *United States* v. *Turner*, 472 F.2d 958 (4th Cir. 1973) the Court concluded that no fifth amendment privilege had been compromised when the defendant was required to "put on the wig and sunglasses so that the jury could compare his appearance with photographs of the robber taken by the bank camera":

> We find that the demonstration did not violate Turner's right against self-incrimination, because the evidence adduced was real or physical and not testimonial or communicative. Schmerber v. California, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966); * * * The distinction which Turner attempts to draw between in-court demonstrations for the benefit of witnesses and those conducted for the benefit of the jury has no relevance to the issue of self-incrimination, since in both instances the jury observes the demonstration.

Id. at 959. *Accord*: *United States* v. *Murray*, 523 F.2d 489, 492 (8th Cir. 1975) (defendant compelled to wear wig before the jury). *See also*: *United States* v. *Satterfield*, 572 F.2d 687, 689-90 (9th Cir.), *cert. denied*, 439 U.S. 840 (1978) (court did not abuse its discretion under Federal Rules of Evidence by compelling defendant to wear a mask in the jury's presence). Nor does the practice of directing a defendant to stand in court for the purpose of identification impugn fifth amendment privileges. *United States* v. *Zammielo*, 432 F.2d 72 (9th Cir. 1970); *Peoples* v. *United States*, 365 F.2d 284 (10th Cir. 1966).

The state forums have universally upheld the constitutionality of compelling the defendant to perform various affirmative acts in the jury's presence. *People* v. *Markley*, 95 Mich. (8) App. 658, 298 N.W.2d 615 (1980) (defendant who did not testify required to appear before the jury in jacket and boots discovered near the scene of the armed robbery); *State* v. *Woodard*, 387 So. 2d 1066 (1980) (defendant required to be fingerprinted in the presence of the jury); *State* v. *Perry*, 230 S.E.2d 141 (N.C. 1976) (defendant required to stand before the jury and place an orange stocking mask over his head in the manner that the victim had testified that it had been worn by the individual who had robbed and shot her); *State* v. *Morgan*, 333 So. 2d 642 (La. 1976) (defendant required to wear a particular shirt); *State* v. *O'Connor*, 320 So. 2d 188 (La. 1975); (defendant required to demonstrate the manner in which he opened a cigarette package); *Urguhart* v. *State of Arkansas*, 621 S.W.2d 218 (S.C. Ark. 1981) (defendant required to remove shirt and exhibit a scar in court); *State* v. *Steward*, 104 Ariz. 305, 452 P.2d 98 (1969) (defendant required to give fingerprints in open court); *State* v. *Williams*, 307 Minn. 191, 239 N.W.2d 222 (1976) (defendant required to wear hat in court to allow jury to compare his appearance with a photograph of the robber).

Several state courts have addressed the precise issue joined in the action *sub judice*. In *Lusk* v. *State of Florida*, 367 So. 2d 1088 (Fla. App. 1979) the practice of compelling a defendant to speak in court for the purpose of allowing a witness to identify defendant's voice was adjudged non-violative of fifth amendment principles. Similarly, in *Coffey* v. *Arkansas*, 550 S.W.2d 778 (S.C. Ark. 1977) the Supreme Court of Arkansas upheld, upon fifth amendment challenge, the lower court's mandate that defendant stand and speak the word's (sic) "This is Kenney Coffey" for the purpose of permitting a witness to determine if the voice on the telephone was the same voice as defendants.[2] The Court of Appeals of Oregon, in *State of* (9) *Oregon* v. *Reynolds*, 603 P.2d 1223, 43 Ore. App. 619, *aff'd*, 614 P.2d 1158, 289 Ore. 533 (1979) upheld as "testimonial in nature" the trial court's requirement that the defendant state to a witness, for purposes of voice identification, the words used in the robbery, to wit, "Don't anyone move, everybody lie down on the floor." In *State* v. *Lacoste*, 256 La. 697, 237 So. 2d 871 (1971) the defendant was compelled to state "hurry up" at trial, the language used by the robbery. The Supreme Court of Louisiana addressed the *defendant's* right to provide the jury with a "live" voice exemplar without

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[2] The non-communicative nature of live exemplars was emphasized.

> [T]he speaker is asked, not to communicate ideas or knowledge of facts, but to engage in the physiological processes necessary to produce a series of articulated sounds, the verbal meanings of which are unimportant. The sounds alone are elicited for identification purposes through characteristics such as pitch, tone intonation, accent, and word stress. The speech patterns of individuals are distinctive physical characteristics that serve to identify them just as do other physical characteristics such as color of eyes, hair, and skin, physical build and fingerprints.

550 S.W.2d at __, citing *People* v. *Ellis*, 65 Cal.2d 529, 55 Cal. Rptr. 385, 421 P.2d 393 (1966).

subjecting himself to cross-examination and thereby use the fifth amendment as a sword rather than a shield. *State of Louisiana* v. *Tillett*, 351 So. 2d 1153 (S.C. La. 1977). The court adjudged that since the state could have ordered the defendant to speak without violating fifth amendment guarantees, principles of due process permitted the defendant to provide non-testimonial speech without exposing himself to cross-examination.

This Court rejects William's theory that a "live" voice exemplar may generate testimonial demeanor evidence and is therefore *per se* unconstitutional. Demeanor typically impacts as a crucial jury inquiry only when a witness offers testimonial evidence, thereby injecting his credibility into issue. In contrast, a defendant compelled to give a live voice exemplar is not a witness for purposes of evolving testimonial evidence. A compelled reading of a neutral passage fails to join the defendant's credibility in issue and the defendant's demeanor axiomatically fails to become relevant or material to the ultimate issue of guilt or innocence.

(10) History has documented that our federal system of criminal jurisprudence is not so frail that justice may not be served unless the jury is prevented from witnessing the defendant's appearance and resulting demeanor at trial. Indeed, the right of a defendant to attend trial and confront his accusers is an integral and historic cornerstone of the judicial process. Whatever intangible demeanor "evidence" a jury may acquire from a demonstrated live voice exemplar is indistinguishable from that which it may gain from daily observations of defendant during the trial. The added visual dimension incidental to a live voice exemplar is merely cumulative.

Poor reading or speaking skills, accents, speech defects, emotional state and/or other voice or personality idiosyncrasies displayed to a jury during the course of

the "live" voice exemplar are equally manifested irrespective of whether the exemplar is procured outside or within the presence of the jury. The very psychological treatise submitted by Williams acknowledges this principle: "The emotional state of a speaker reading a neutral passage can be recognized from a *tape recording*." *Argyle, supra*. The live exemplar compelled in the case at bar is indistinguishable, for purposes of fifth amendment analysis, from those non-live voice exemplars proclaimed as constitutional in *Dionisio* and in this Circuit's subsequent decisions. *See*: *United States* v. *Frank, supra; United States* v. *Woods, supra; United States* v. *Mitchell, supra*. The proscriptive parameters of compulsion to submit a live voice exemplar are products of evidentiary rules and judicial discretion rather than of constitutional dimension. Accordingly, this Court rejects petitioner's fifth amendment assignment of error.

Williams secondly contends that the district court erred in denying a motion for judgment of acquittal as predicated upon the proposition that the acts ascribed to him failed to constitute a criminal attempt. Viewing the evidence in the light most favorable to the government, *Glasser* v. *United States*, 315 U.S. 60, 62 S.Ct. 457 (1942), *United States* v. *Conti*, 339 (11) F.2d 10 (6th Cir. 1964), it is apparent that (1) Williams telephoned Conn's residence and, assuming Bertee was Arnott, inquired whether he could purchase an ounce of "snow"; (2) Williams was informed to "come on up"; (3) approximately 15-45 minutes later Williams arrived at Conn's residence with a revolver and $3,400, whereupon an arrest was effected. It can be inferred from the record that Williams possessed adequate funds to conclude a narcotics transaction.

The two requisite elements of an attempt are (1) an intent to engage in criminal conduct and (2) the

performance of one or more overt acts which constitute a substantial step towards the commission of the substantive offense. *United States* v. *Manley*, 632 F.2d 978, 987 (2d Cir. 1980), *cert. denied*, 449 U.S. 1112, 101 S.Ct. 922, 66 L.Ed.2d 841 (1981). *See also*: *United States* v. *Mandujano*, 499 F.2d 370, 376 (5th Cir. 1974), *cert. denied*, 419 U.S. 1114, 95 S.Ct. 792, 42 L.Ed.2d 812 (1975); *United States* v. *Jackson*, 560 F.2d 112, 118-19 (2d Cir.), *cert. denied*, 434 U.S. 941 (1977); *Mimms* v. *United States*, 375 F.2d 135, 148 (5th Cir. 1967); *United States* v. *Busic*, 549 F.2d 252, 257, n.9 (2d Cir. 1977); *United States* v. *Phillips*, 664 F.2d 971, 1037 (5th Cir. 1981), *cert. denied sub. nom. Myers* v. *United States* __ U.S. __, 102 S.Ct. 2965 (1982); *United States* v. *Alvarez*, 610 F.2d 1250, 1254 n.3 (5th Cir. 1980), *cert. denied*, 451 U.S. 938 (1981). In the case most factually analogous to the action *sub judice*, sufficient evidence was adjudged to have supported a conviction for attempt to possess narcotics where the defendant was present in a residence of an acquaintance where cocaine was discovered and the defendant possessed a sum of currency roughly equivalent to the purchase price of a quantity of cocaine discovered upon a scale. *United States* v. *Manley*, *supra*. In the case at bar, Williams actively solicited a narcotics sale by telephone and within a short time interval, voluntarily appeared at the Conn residence with a weapon and a substantial amount of cash to consummate the purchase from the cache (12) of cocaine Arnott had recently transported to Michigan from Florida. In the absence of police intervention, Williams would have consummated the same overt acts as had the defendant in *Manley*. This Court adjudges that the conduct ascribed to Williams was of sufficient weight to support a criminal attempt. *Cf. United States* v. *Joyce*, 693 F.2d 830, (8th Cir. 1982) (defendant's conduct evidenced that any intent which had existed had been affirmatively abandoned).

Thirdly, Williams asserts that the district court improperly excluded exculpatory evidence. Williams advised the Court that the testimony of Marie Ogden (Ogden), an Internal Revenue Service employee, would be offered for the purpose of proving the defendant owned (sic) $3,300 in overdue taxes and had expressed an intent to repay the same. Ogden's testimony, it is argued, would have provided the jury with an alternate explanation for the $3,400 taken from Williams. The defendant proffered that Ogden would testify that approximately two months prior to the date of the alleged offense in February, 1981, Williams stated, during a telephone conversation with Ogden, that "*If* my mother sells the house and she gives [the money] to me, *then* I will bring it." In conjunction with the proffered testimony, Williams noticed the Court that no evidence would be presented to establish that his mother had actually sold her house or intended to give him the proceeds of the sale or had actually given him any money. The Court, subsequent to characterizing Ogden's testimony as hearsay and lacking in relevance, excluded the proffered testimony.

Ogden's testimony was offered under Rule 803(3), Fed. R. Evid.:

> A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as *intent*, plan, motive, design, mental feeling, pain and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless (13) it relates to the execution, revocation, identification, or terms of declarant's will. (emphasis added)

Rule 803(3) "statements" are not excluded by the hearsay rule even though the declarant, in this case Williams, is available as a witness. A statement of *intent* to perform a future act is a state of mind exception to the hearsay rule. *Mutual Life Insurance Co.* v. *Hillmon*, 145 U.S. 285, 12 S.Ct. 909, 36 L.Ed. 706 (1892); *United States* v. *Hoffa*, 349 F.2d 20, 45 (6th Cir. 1965), *aff'd*, 385 U.S. 293, 87 S.Ct. 408 (1966), *reh. denied*, 386 U.S. 940, 87 S.Ct. 970 (1967). Accordingly, Ogden's testimony reflecting the defendant's intent to perform the future act of paying overdue taxes in the amount of $3,300 could not be excluded as hearsay testimony.

However, Ogden's testimony concerning the defendant's intent to perform a future act was affirmatively qualified by two conditions subsequent, namely, the sale of his mother's house and a gift of the proceeds received from the sale to Williams to satisfy the tax indebtedness. Since Williams advised the Court that no evidence supporting the occurrence of either of the conditions would be presented from which the jury could infer that he was capable of acting upon the expressed intent in a manner consistent with the conditions, the district court did not abuse its discretion in precluding Ogden's testimony.

The District Court did not abuse its discretion by admitting into evidence the weapon which had been retrieved from Williams' automobile. *See*: *United States* v. *Marino*, 658 F.2d 1120 (6th Cir. 1981).

The judgment of the district court is AFFIRMED.

APPENDIX C

ORDER

(United States Court of Appeals
for the Sixth Circuit)

(Filed May 18, 1983)

(United States of America, Plaintiff-Appellee, v. O'Neal Williams, Defendant-Appellant — No. 82-1105)

Before: Keith and Krupansky, Circuit Judges, and Phillips, Senior Circuit Judge

Presently before the panel is a petition for rehearing. Upon due consideration, said petition is hereby DENIED.

Entered By Order Of The Court

/s/ John P. Hehman
Clerk